IN THE

SUPREME COURT

OF THE

UNITED STATES.

C. S. Thompson et al.,
Defendants and Appellants,
v.
Los Angeles Farming and Milling Company,
Plaintiff and Appellee.

BRIEF FOR PLAINTIFF AND APPELLEE.

Explanation to the Court.

We are informed by the clerk of this court that the hearing of this case will probably be reached in April, 1900; that the appellants have deposited with him twenty-four copies of the record as printed for the use of the Supreme Court of the state of California in this action; that the clerk adopts the same, and will print such additional matter as is necessary, when the money estimated as necessary to do such additional printing is furnished. We have not received a copy of the record upon which this case

will be heard, here, but we understand that the additional printed matter will consist of petition for writ of error, assignment of errors, citation, proof of service thereof, return of clerk thereon, and writ of error.

Such being the case, although we have not been served with the record on appeal here, and have not had the benefit of appellants' brief, we prefer to have our brief on file when the case is called, and as the record may not be printed and filed in time for us to prepare brief after service of record on us, and as we will probably only desire to refer to the assignments of error in the additional matter printed, we will set out in full in our brief the assignments of error and make our references to the folios of transcript on record, as used in the court below, and when we have to refer to the assignments of error, will refer to same as set out here.

Statement of Case.

This is an action in ejectment brought by the appellee against the appellants and many other defendants, in the Superior Court of the county of Los Angeles, state of California, to recover possession of a portion of the rancho ex-Mission San Fernando, situated in said county of Los Angeles. Judgment was rendered in the Superior Court for the appellee, and an appeal taken by the defendants and appellants here to the Supreme Court of the state of California, and judgment was affirmed.

Los Angeles Farming and Milling Co. *v.* Thompson, 117 Cal. p. 594.

We print the decision in this case in full as an appendix to this brief. [See appendix.]

The complaint contains allegations looking to equitable relief. [Tr. fols. 4-36.] The latter feature of the pleading becomes immaterial in view of judgment rendered. [Tr. fols. 107-116.]

While there were many defendants to the action, the judgment has become final as to all of them except C. S. Thompson, Joseph Mazet, Rose D. Mosher, F. N. Culp, Henry C. Vincent, R. J. Tarbell, John J. Shore, I. B. Cox and Elwin G. Carter, appellants here, who sued out writ of error to this court. [See petition for writ of error, page 298, folio 902, of record.]

The assignments of error relied upon by appellants are as follows:

1. "Your petitioners further represent that the judgment of this court was erroneous in sustaining the decision of the trial court in holding the said patent from the United States to Eulogio de Celis, dated January 8th, 1873, was conclusive of the case and cut off defendants in the trial court from introducing testimony to show its validity.

2. "The court erred in refusing to allow defendants in the trial court to introduce the petition of said de Celis before the board of land commissioners for the confirmation of his claim to the land, together with copies of the grant from Governor Pico to him, and the decree of confirmation by the board of the claim with the opinion of the board of its validity.

3. "The court erred in refusing to allow defendants to prove by such petition and by such alleged grant that de Celis did not claim such lands or any part thereof by virtue of any right or title derived from the Mexican or Spanish government.

4. "The court erred in affirming the action of the trial court in instructing the jury to find a verdict for the plaintiff.

5. "The court erred in rendering a judgment of affirmance of the judgment and order of the trial court in favor of the plaintiff when it should have rendered a judgment of reversal in favor of the defendants in that court. Reference is hereby made to the record of said case for further particulars bearing on this petition and these assignments of error."

The answer to one of these propositions answers all of them, and the fact established at the trial of this action in the trial court must necessarily be briefly set out here in order properly to apply the authorities cited by us.

Facts Established at Trial.

Appellee's title is based upon a Mexican grant for which a patent was issued by the government of the United States to Eulogio de Celis. [Tr. fol. 5.] The instrument is here set out in full. It is in the usual form, duly signed by the president. [Tr. fols. 118-183.] After the issuance of this patent a suit was brought in the then District Court of the Seventh Judicial District of California. [Tr. fols. 183, *et seq.*] A judgment in partition was rendered therein which purported to allot the San Fernando ranch upon a survey made by one Reynolds. By that decree there was set apart to the San Fernando Farm Homestead Association, appellee's predecessor, the tract of land described at folios 191, *et seq.* This is, save as to twelve thousand acres excepted from the east end of the same tract, the same property described in the complaint. [Tr. fols. 8, *et seq.*] It was also shown that the appellee, by *mesne* conveyances, succeeded to whatever title passed by the decree of partition; that the land described in the complaint is the same property set aside to the San Fernando Farm Homestead Association, subject to the foregoing exception, and that that association paid to Pico, $115,000.00 in 1869, for an undivided one-half of the San Fernando rancho; [Tr. fols. 313-315.] It will also be noted that the Encino ranch—an independent grant—is not claimed by plaintiff. It thus appears that there was a partition of the San Fernando rancho by the District Court of Los Angeles county, and that the plaintiff's predecessor in interest, by that decree, was awarded the land described in the

complaint. A number of exhibits were filed in the record, and among them many maps so large that they could not be bound into the transcript on appeal. We are not aware whether the appellants have filed in this court copies of these maps; but if they have not, we will ask permission of the court to furnish copies thereof before the case is submitted. The Hancock survey, often alluded to, is that upon which the patent issued. The Reynolds survey, upon which the partition was made, is the re-location of that made by Hancock. (See report of Reynolds, Tr. p. 79, fols. 229, *et seq.*) The decree shows that the court making it dealt with the San Fernando grant. The Reynolds survey is displayed on the document marked "16,240, L. A. F. & M. Co. *v.* W. H. Hoff *et al.* Plaintiff's Exhibit 33; filed May 13, 1892;" also marked "16,393, L. A. F. & M. Co. *v.* Thompson; Plaintiff's Exhibit 29; filed April 5, 1895." (This double filing is explained by the fact that this map was introduced in a former trial involving the same issues made on the complaint herein and determined finally by the decision of this court [see 34 Pac. Rep. 518] already alluded to.) In that litigation every point now made against the appellants here was made against the defendants in that action. If this court will examine this exhibit, which we will hereafter call the Reynolds map, it will be observed that the tract described in the complaint and in the partition decree appears clearly thereon. From this tract there must, as stated *supra*, be excepted the Encino rancho, and 12,000 acres constituting the east part thereof. Thus the complaint description [Tr. fol. 8] accords with the partition decree description. [Tr. fol. 191.] The point of commencement is the northwest corner of the Rancho Providencia which, it will be observed, is located in the southeastern part of the Reynolds map. This corner is Station "2" of the Rancho San Fernando, and "3" of the Provi-

dencia. From this point the description runs to a point marked on the west line of the plat "Station in Md., 493." Thence the line proceeds by various courses, until it reaches the western exterior boundary of the San Fernando ranch. Thence the course changes and runs southwesterly until it reaches the northwestern corner of the Rancho El Escorpion, near the point marked "Leonis." [Tr. fols. 10-193.] (See western line of Reynolds map.) From there the boundary follows the north, east and south lines of the Escorpion to the point at the southwest corner of the Escorpion marked "Post in Mound, S. F. 37." [Tr. fols. 11–94.]

Thence the survey follows the line between the rancho Las Virgenes to the point marked on the map "Blazed White Oak, S.F. 39." [Tr. fols. 12-195.] Thence along the southerly line indicated upon the plat to which we have referred [plaintiffs' exhibit 29] and at a point marked "Sandstone Rock, S. F. 41" on high point of mountain is found a connecting corner of the rancho San Vicente y Santa Monica. [See Reynolds' map.] The survey then follows along the line indicated upon the Reynolds map to the place of beginning. It will be observed that the premises thus described, including the 12,000 acres, are marked upon the Reynolds' map "San Fernando Farm Homestead Association." The attention of the court is called to the rancho El Encino [a patented grant] which is correctly located upon the Reynolds' map immediately south of the words "San Fernando Farm Homestead Association." A map of this grant is in evidence [plaintiff's exhibit 28.] The appellants are nomads, not possessed of any right, and compelled to rely upon the supposed weakness of appellee's title, not upon the strength of their own. Appellant Mosher, by her answer, claims that in October, 1891, she entered upon 160 acres of the land demanded by

the plaintiff, but she asserts that this land was outside of the grant. She avers that she was then, and still is, a citizen of the United States, over 21 years of age, and a qualified homesteader; that her entry and settlement was made in good faith, and that she filed with the register and receiver of the local land office her declaration of homestead, and she denies that the lands upon which she settled are within the boundaries of the grant confirmed to de Celis and denies appellee's title. [Tr. fols. 90-92.] She makes no allegation as to whether or not she has exhausted her homestead right. The answers of the other appellants were in same form. [Tr. fol. 849.]

In order to locate the uncertain possession of this person who did not volunteer to take the stand, appellee produced an affidavit and application tendered by her to the land office from which it appeared that she claimed the right to settle in the northwest quarter of section 31, township 2 north, range 16 west, San Bernardino meridian. The location of this property appears from an inspection of map marked plaintiff's exhibit 30. The quarter section thus identified is northeast of the northeast corner of the Rancho El Escorpion and south of the north boundary of the tract which we have already described as the "San Fernando Farm Homestead Association."

At this point it may be well to locate the position of each one of the appellants appealing.

There is no record of any filing by F. M. Culp, nor did he testify. Witness Gray says that Tarbell entered north of the Encino, and that Culp was south on the adjoining quarter section. For the location of Tarbell see map marked plaintiff's exhibit 30, northeast of and near the Rancho El Encino. Mr. Gray points out the situation of each of the defendants. [Tr. fols. 348 *et seq.*] The

description given by this witness is sufficient to fix the point of attack of the claimants upon either of the ranch maps, but it will facilitate the investigation to refer to exhibit 30 already mentioned. The Tarbell application was for the southeast quarter of section 22, township 1 north, range 15 west, San Bernardino meridian. [Tr. fol. 367.] We have already indicated this upon exhibit 30. John J. Shore applied for land lying across the stage road appearing upon exhibit 30, easterly of the Rancho El Encino. His application described it as the southeast quarter of section 22, township 1 north, range 15 west, San Bernardino meridian. [Tr. fol. 365.] [Testimony Shore, fol. 316.] The stage road mentioned appears on the Reynolds' map and is there marked "Overland Stage Road."

Henry C. Vincent attempted a filing upon the northeasterly quarter of section 20, township 1 north, range 15 west, S. B. M. He sought to locate within a mile and a half of the buildings at the sheep ranch on the stage road, and a mile east of the Encino. [Gray Tr. fol. 351–2.] The court will notice on the Reynolds' map the words "Sheep Camp." Vincent was between that point and the eastern ranch line.

Edwin Carter attempted to file on the northeastern quarter of section 16, township 1 north, range 16 west, S. B.M. [Tr. fol. 369], due west from the Rancho El Escorpion. [See plaintiff's exhibit 30.]

Joe Mazet intruded upon the left of the road near the Encino. He did not tender any filing. In fact, there was no evidence that he was a bona fide claimant. The same may be said of all the appellants.

Defendant Cox filed an application for section 31, township 2 north, range 16 west, S. B. M. [Tr. fol. 364.] There is no dispute that all of sections 14-23 are within the exterior boundary lines of the San Fernando. [Tr. fol. 778.] Each of the appellants'

pretended settlement is indicated upon exhibit 30, which is based upon the Reynolds' map referred to in detail by witness Ensign and also by Lankershim and Van Nuys. There is a map referred to especially in the testimony of the witness Grove, who is the so called expert of defendants, which is marked "plaintiff's exhibit 2." This is called a comparative map, and contains a platting without any reference to natural objects of the Hancock, Ensign and Reynolds surveys. Its author, Grove, is the litigation promoter of appellants. He never surveyed the San Fernando boundary except upon the Robinson Crusoe plan. Exhibit 2 was manufactured by this witness. By referring to this plat and comparing it with exhibit 30, it will become obvious that it does not make the slightest difference so far as these appellants' are concerned, whether the Hancock, the Reynolds, the Ensign or the Grove survey is accepted as the true line of the San Fernando grant. In any case, the appellants are within the limits of the grant. An inspection of the plat proves this and the witness Grove concedes it. [Tr. fol. 777.]

The foregoing illustrates the title upon which the appellee relies, and which is unassailed as far as the evidence is concerned. Appellee did not, however, rest upon its paper title alone.

C. A. Ensign was examined [Tr. p. 142, fols. 420, *et seq.*] Mr. Ensign is a civil engineer and surveyor. He surveyed the exterior boundary of the San Fernando rancho throughout its entire length with the patent, Hancock and Reynolds' survey notes before him [Tr. fol. 420], and located the premises in accordance with our contention, and he also certified that sections 14–23, which include defendant's alleged claims, are all within the boundaries of the San Fernando as patented, and that all the lands lying within the black line, which mark the exterior

boundaries of the rancho as shown in document marked plaintiff's exhibit 30, are within the patent boundaries. Mr. Ensign's cross-examination was very lengthy, but he sustained himself in such a manner as to leave nothing to be desired by respondent.

There is not a word in the record from one end to the other which, in any degree, conflicts with the material statements of Mr. Ensign. There may be a doubt as to the proper location of the ranch line at the southwest corner, though the uncontradicted testimony of Pico ought to settle even that contention. It was because of this supposed uncertainty that the appeal was taken in this case by Hoff and others, appellants in this action. [34 Pac. Rep. 518.] But there is no survey made by anybody and no suggestion upon the present trial which does not identify each and all of these appellants within the admitted exterior lines of the Hancock survey and the patent. The testimony of the appellants is meager. They kept out of the way. None of them took the stand for the defense. They studiously avoided subjecting themselves to cross-examination. The only witnesses who were examined by the appellants were P. Higgins [Tr. fol. 750], E. Rocha [Tr. fol. 758], C. C. Grove [Tr. fol. 759]. Higgins says that he has occupied land which extends a half or a quarter of a mile north of the Reynolds' line; that he has held to what he claimed to be the grant line. [Tr. fol. 752.] That he does not claim to run down into the San Fernando valley, but holds up to what he supposes the Hancock line to be; that he knows the old Los Angeles and Ventura stage road, which runs through the San Fernando grant; that he is half a mile, more or less, south of that road; that there is probably a quarter of a mile of section 35, within which his claim is situate north of the Hancock line; that neither of the persons to whom

he alludes holds north of the Hancock line [Tr. fol. 756.] No witness disputes the right and fact of appellee's possession of the grant.

By referring to the Reynolds map [Plaintiff's Ex. 29], it will be seen that Higgins has never been upon any of the property claimed by either of the appellants. The Hancock line according to the Grove map, [Plaintiff's Ex. 2] runs easterly and westerly, or greatly south of the Rancho El Encino, and but little north of the Reynolds line. Higgins does not make any pretensions north of the Hancock line. There is no room for the pretense that there has been any interruption of appellee's possession as far as the lands in controversy are concerned, and no interruption worthy of the name, unless it be as regards the insignificant fragment claimed by Higgins.

E. Rocha, a witness called on behalf of the appellants, said that in 1879, he took up a government claim near the Cahuenga Pass, and that he was ejected by Lankershim, the agent of the appellee. On cross-examination he also says that his brother-in-law, Alvarez, was ejected in a suit brought by the present appellee. [Tr. fol. 759.]

Then C. C. Grove, the so-called expert, who testified about a boundary which he never investigated, explained his map already referred to as plaintiff's Ex. 2. [Tr. fol. 250.] The witness platted each of the surveys referred to without any reference to monuments. He never surveyed the original outside line. [Tr. fol. 764.] He made nothing but a theoretical examination, and yet it is upon this person that counsel relies to show that the Hancock lines would not close. At folios 767, *et seq.*, the witness attempts to show various discrepancies in the surveys, all of which are supposed to be proven by inaccuracies brought out by his platting of the surveys without reference to monuments or to possible

errors in courses and distances. The witness says that he does not *think* that a person could go on the ground with Reynolds' map and find the boundaries [Tr. fols. 774,] but he does not know anything about it. He is merely guessing. It appears from the cross-examination of Grove [Tr. fols. 775, *et seq.*] that he has been endeavoring to dispute the possession of the occupants of the San Fernando grant.

But as already noted, he admits that the appellants, of whose possession he is cognizant, were mere intruders, even upon his own theory. [Tr. fols. 777, 779.] He refers to the Leonis house. [See point marked "Leonis" on Reynolds map, plaintiff's Ex. 29; said point being almost due west of the northwest corner of the Rancho El Escorpion, located upon the west boundary of the said exhibit.] Then the witness proceeds, "If my plat of the Hancock survey is correct the Leonis house would be within the boundaries of the Escorpion ranch as patented." [Tr. fol. 780.] The Los Angeles and Ventura road is correctly delineated upon plaintiff's Ex. 30. [Tr. fol. 781.] He also testifies that according to his location of the Rancho Escorpion, under the Hancock survey, the house of Leonis would be within the limits of the San Fernando or the Escorpion, whereas the patent map of the Escorpion shows that it is outside of the exterior limits. [Tr. fol. 794; plaintiff's exhibit 28.] So that according to Grove's idea the patent lines of the Escorpion must be moved eastward. The patent of the Escorpion agrees exactly with the San Fernando patent [Tr. fol. 804,] even according to map plaintiff's exhibit 6.

Appellants Vincent, Shore, Tarbell, Mazet, Carter, Culp and Cox, if placed according to the plat upon which their names are written, would all be within the patent boundary. [Tr. fols. 804-5.] The witness testifies against the Hancock and Reynolds surveys merely upon opinions without foundation. [Tr.

fol. 811.] According to Grove errors in courses and distances invalidate a patent.

It is impossible adequately to describe Mr. Ensign's verification of the survey lines without following his testimony. Mr. Ensign's location of the United States coast survey [Tr. fol. 461] is important and convincing. It is needless, however, to spend time upon the precise situation of the exterior lines of this grant, because upon any theory and in any aspect whatever, the particular location of the appellants and the special pieces of property which they claim are within the grant. As to whether the judgment awards respondent portions of the San Fernando which the appellants do not now claim, we will not stop to inquire. Even if the decree extends beyond the unlawful pretensions of appellants, they are not injured. No harm can happen if they are adjudicated to have no interests in lands which they do not pretend to own, but over which they passed in their pursuit of the property of another. We could not, at the time of the institution of the suit, definitely fix their possessions. Even the answers filed are not candid in this respect. If we take plaintiff's exhibit 2 [the Grove map], upon which appellants rely, we will find that according to his location of the Hancock survey, the south line of the San Fernando and the north line of the rancho San Vicente y Santa Monica do not accord, and appellants' contention is that there are public lands between these grants; but the United States official surveys prove otherwise. The patent of the San Vicente y Santa Monica shows a common line for the south boundary of the San Fernando and the northern line of the San Vicente y Santa Monica.

We will briefly refer to some of the appellee's exhibits.

No. 28 is the rancho El Escorpion. The plat is taken from the patent of the grant. If appellants'

theory is correct this patent is wrong. Grove can move about patent lines with coolness and dispatch. A blue pencil and a piece of paper is sufficient equipment for such service.

We then have plaintiff's exhibit 23, which is an official plat of the rancho Providencia, located along the south part of the eastern line of the Reynolds' map. [Plaintiff's exhibit 29.]

Then the plat of the rancho Tujunga. This grant is located along the east line of the San Fernando. [See "Tujunga" on east of plaintiff's exhibit 29.]

Plaintiff's exhibit 27 is a government survey of T. 3 N., R. 15 W., S. B. M. This tract lies immediately outside of the San Fernando and accords with the description for which we contend. [See Reynolds' map, plaintiff's exhibit 29, and particularly the northeast part thereof, immediately south of the words "San Fernando mountains," with which the lines of plaintiff's exhibit 27 coincide.]

Plaintiff's exhibit 25 represents the government survey along that part of the San Fernando line immediately north of the rancho Tujunga already referred to.

Plaintiff's exhibit 26 represents the line of the government survey which separates T. 2 N., R. 15 W., S. B. M., from the rancho San Fernando.

Plaintiff's exhibit 24 further shows the connection of the San Fernando with the rancho Providencia and the lands lying immediately north thereof. [See southwest corner of Reynolds' map, plaintiff's exhibit 29.]

Plaintiff's exhibit 6 we have already cited. It is a plat of the rancho San Fernando, duly certified, from the office of the surveyor-general of California, and entirely sustains plaintiff.

The same may be said of plaintiff's exhibit 1. This exhibit shows that the rancho San Vicente y Santa Monica abuts upon the San Fernando on the

south and effectively negatives appellants' contention that there is any public land between those two points. This exhibit is a copy of the patent map as appearing on the records of the county recorder.

Plaintiff's exhibit 36 is a plat of the rancho San Vicente y Santa Monica, and the northern line thereof accords with the southern line of the San Fernando. This is an official plat taken from the map of record in the county of Los Angeles.

Plaintiff's exhibit 6, already referred to, is a portion of the rancho San Fernando upon which the various government sections are platted, and according to this map all of the appellants involved are within the patent limits of the grant.

From these facts the conclusion is inevitably deduced that the appellants here appearing are all upon the patented San Fernando grant, within the limits of the territory for which the appellee holds the paper title, and that appellee is indisputably entitled to recover because it is the owner of the premises invaded.

Some of the exploits of the witness Grove in connection with the San Fernando ranch appear in Lacey *v.* Porter, 103 Cal. 597.

Appellants' Entry and Appellee's Possession.

R. J. Tarbell, who is one of the appellants, testified upon being called by appellee (he chanced to be in the courtroom and was put upon the stand by appellee), that he belonged to an organization known as the San Fernando Protective Association. There were about a hundred members. These people intruded upon the ranch. The witness and his brother selected a place a little east of the Encino rancho, near the north corner. The object of the association was to enable the members to go on the land in controversy and to maintain a settlement.

Appellants Vincent and Carter were members of the association. [Tr. fols. 308–9.] The witness says that he understood that the object of the association was to get land that was held under fraudulent titles. He knew at the time he entered the land that it was claimed by the Los Angeles Farming and Milling Company, and that they were farming it at the time. It was plain to anybody. "I didn't go over the whole of it, but I knew they were farming part of it, but don't know how much. I know that they were farming where I went."

The facts certified to by this witness are not disputed by any one. The so-called *bona fide* homesteaders did not dare to take the witness stand. Not one of them swore to anything indicating good faith.

It appears from the testimony of Lankershim [Tr. fol. 326] that he acted as superintendent of the southern half of the San Fernando grant. He took the Reynolds' or partition map for his guidance, and watched the boundary lines [Tr. fol. 327.] Sometimes there were trespassers [Tr. fol. 328.] There was only one man in all the time that Lankershim acted as superintendent, who persistently maintained that he was going to settle, and he was ejected.

"I maintained absolute possession of the whole ranch during the time that I was in charge." [Tr., fol. 329.]

The testimony of this witness is important, and we request the court to peruse the same.

Mr. Lankershim was superintendent continuously for seven years. [Tr. fol. 325.] At folio 332 the witness explains the cultivation of the ranch; shows that it was farmed extensively, the amount actually in cultivation reaching thirty thousand acres. Wheat and barley were raised. The wheat was turned into flour by the appellee. [Tr. fol. 333.] There were about twenty thousand acres in grain in

1891, when the appellants entered. [Tr. fol. 334.]

The cross-examination of this witness is important, and shows exclusive possession without substantial interruption. [Tr. fols. 336–345.]

John J. Shore, one of the appellants, was also called and located his claim, as already stated, at the place indicated on plaintiff's exhibit 30, the same being there marked "John J. Shore."

The testimony of Mr. Gray [Tr. fols. 348–357] is to the effect that the appellants "jumped" upon the lands in the actual occupancy of the appellee. [Tr. fol. 354.]

"I could swear that there was stubble growing where every one of these people were located, because there wasn't anybody located in any place but what there was stubble growing. Where they had cabins they were set down in the stubble," etc. "I was there in September, October, November and December, and the stubble was that fall's stubble." [Tr. fol. 354.]

At the time that Mr. Gray saw the land the appellee had some 120 men in its employ, and six or seven hundred head of stock grazing on the ranch.

Mr. Lankershim, upon being recalled, says that he kept possession of the San Fernando up to the line of the Rancho San Vicente. This grant has been already alluded to, and the northern line of the San Vicente appears on plaintiff's exhibit 36, and is the common boundary of the San Vicente and San Fernando. See also plaintiff's exhibit 6.

R. Pico was an important witness. His testimony can be found at folios 402, *et seq.* He resided upon the San Fernando rancho from the year 1848 until a year before the trial. Was there when the partition was made, and is familiar with the boundaries of the rancho. His testimony is attacked by appellants upon the ground that he failed to remember the particular date when the survey was made. Mr.

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Pico's testimony corroborates the theory upon which Mr. Ensign located the line. There are some differences between the calls of the Hancock survey and that of Reynolds. For instance, Mr. Hancock calls a white oak a live oak twice, but Pico, who was present, identifies the actual tree. [Tr. fol. 405.] Witness also testifies to the continuity of the possession by Lankershim and Van Nuys, both of whom, it must be remembered, are representatives of the corporation appellee here.

The cross-examination of Mr. Pico did not lessen but rather increased the force of his evidence, and served to strengthen appellee's case. Pico pointed out this tree to Mr. Ensign, the surveyor, and a photograph of the tree made by surveyor Jackson [Tr. fol. 423] was filed as plaintiff's exhibit 19. [Tr. fol. 424.]

I. N. Van Nuys, the president of the appellee, was called. [Tr. fols. 369, *et seq.*] He testifies to the possession which was enjoyed by the appellee and its predecessors for years prior to appellant's entry. The witness locates the improvements upon the ranch [Tr. fol. 374]. For eight or nine years the appellee has farmed from ten to thirty thousand acres on the grant. [Tr. fols. 372-3.] Prior to the cultivation the ranch was used for pasturage purposes.

"There was no part that was not used by the appellee for some purpose." [Tr. fol. 375.]

Where "Henry C. Vincent" is marked upon plaintiff's exhibit 30, the land was cultivated. [Tr. fol. 381.] All of the five sections lying immediate north of the line marked upon plaintiff's exhibit 30 "T. N., R. 1 W." was cultivated in 1891 in wheat, with the exception of a small piece which they planted to barley. No person other than the San Fernando Farm Homestead Association or the appellee has held possession of any part of the ranch for any

length of time since 1871. Occasionally some one would go into the cañons for wood, but they were removed. No one has held possession against the appellee. [Tr. fols. 384–5.]

Mr. Van Nuys here describes the peculiar and bold intrusion perpetrated by appellants. [Tr. fol. 356.] At all times since 1880 the Farming and Milling company has paid all the taxes on the land and it has been assessed by sections. Prior to 1880 the San Fernando Farm Homestead Association paid the taxes and the land was assessed to it. Appellee has always claimed under the Reynolds' or partition map and has always maintained possession against intruders upon those lands. [Tr. fols. 386-7.]

The witness, on cross-examination, shows that suits were brought upon several occasions to maintain appellee's possession and the appellee was always successful. [Tr. fols. 391 *et seq.*]

The testimony of H. C. Wiley [Tr. fols. 315 *et seq.*] is likewise important. He says that he lived on the San Fernando rancho from the 1st day of August, 1858, and had charge of the property for Gen. Andreas Pico, who claimed it all. The claim made by Gen. Pico and by this witness was so co-extensive with that of Pico's successors, including the appellee. Wiley held to the top of the mountain on the south. [Tr. fol. 318.] No one but Andreas Pico and his tenants occupied these premises. [Tr. fol. 319.] Some parties occasionally entered, but they left upon demand and without suit brought. [Tr. fol. 321.] The south line of the San Fernando, which is referred to by this witness, is about two miles south of the Encino. [Tr. fols. 324-5.] There is no question as to the correctness of the Encino location.

E. T. Wright testifies that he acted with Ensign in making the survey heretofore referred to; that he

calculated the area contained in the grant; that the patent area was 121,396.13; that the area included within the Ensign surveys sums up 121,311.10 or 85.03 acres less than the patent area. Rather a remarkable result, considering the rough country, and the extent of the surveys.

The appellants introduced a judgment roll in a suit brought by this plaintiff against Foster. [Tr. fol. 822.] The plaintiff recovered judgment within about a month after the action was instituted. Appellants also introduced the record in another suit by the same plaintiff against one Kelsey, *et al.* [Tr. fol. 823.] The evidence showed that after the complaint was filed the defendants therein left. [Tr. fol. 825.] There are also a number of other exhibits which do not appear to be essential to a decision of this case. It might be well, however, to mention the map of the Rancho Providencia, [Tr. fol. 681] which adjoins the San Fernando on the southeast. See also exhibits Tr. fol. 683, *et seq.*, all of which are contiguous to the San Fernando, and wherever such contiguity appears the lines of the Ensign survey coincide. The only survey proven on this trial was that to which Ensign and Wright testified. Grove made no survey whatever of the boundaries of the ranch, and wherever he advances a theory inconsistent with the testimony of Ensign he is flatly contradicted by the record. He cannot upset a record, even though he should double his theories and his emphasis.

After the evidence was all in the court instructed the jury to find for the appellee. [Tr. fol. 826.] A verdict was rendered accordingly. A motion for a new trial was made and denied. Defendants, who are appellants here, appealed to the Supreme Court of the State of California, and the judgment was affirmed. [See appendix for opinion.] The appeal was heard upon a "Transcript on appeal" including

pleadings and statements on motion for new trial. Which transcript in the main constitutes the record here.

Law of the case.

I.

THE APPELLEE'S TITLE, BEING BASED UPON A UNITED STATES PATENT, CANNOT BE SUCCESSFULLY ASSAILED BY THE APPELLANTS, AND THE VARIOUS AVERMENTS IN THE ANSWER AND THE ATTEMPTS MADE AT THE TRIAL TO ATTACK SUCH PATENT AND THE SURVEY THEREIN INCORPORATED CANNOT PREVAIL.

Before discussing the law which must govern your decision in this case, we call your honor's attention to the fact that the defense attempted to be made by the appellants herein, is a *collateral* and not a direct attack upon the United States Patent which is the source of appellee's title.

We have already seen that appellee has succeeded to that portion of the San Fernando patented lands which were set apart in the decree of partition to the San Fernando Farm Homestead Association with certain exceptions not important at this point. The patent is found Tr. p. 42, *et seq.*, and is in the usual form. This document is conclusive as to the validity of the grant referred to and also as to the survey thereof.

In Beard *v.* Federy, 3 Wall. 478-492, it was said, in speaking of a patent issued upon a Mexican grant:

"By it the government declares that the claim "asserted *was valid under the laws of Mexico*; *that it* "*was entitled to recognition and protection* by the stip- "ulations of the treaty, and might have been located "under the former government, *and is correctly* "*located now so as to embrace the premises as they are* "*surveyed and described.* As against the govern-

"ment, this record, so long as it remains unvacated, "is conclusive. And it is equally conclusive against "parties claiming under the government by title "subsequent."

See, as supporting this view, and as applicable to this suit:

West *v.* Cochran, 17 How. 403;
Foster *v.* Mora, 98 U. S. 425;
Smelting Co. *v.* Kemp, 104 *Id.* 640;
More *v.* Steinbach, 127 *Id.* 70;
Craigin *v.* Powell, 128 *Id.* 691;
Knight *v.* The United Land Ass'n, 142 *Id.* 161;
Chandler *v.* Calumet & H. M. Co., 149 *Id.* 79;
Barden *v.* N. P. R. Co., 154 *Id.* 288;
Lake Superior Ship Canal R. I. Co. *v.* Cunningham, 155 *Id.* 354;
Stoneroad *v.* Stoneroad, 158 *Id.* 240;
Russell *v.* The Maxwell Land Grant Co., *Id.* 253;
McCormick *v.* Hayes, 159 *Id.* 332;
Manning *v.* San Jacinto Tin Co., 7 Saw. 418; 9 Fed. Rep. 729;
Mora *v.* Nunez, 10 Fed. Rep. 640;
Houston *v.* San Francisco, 47 *Id.* 340;
U. S. *v.* San Jacinto Tin Co., 10 Saw. 639;
Waterman *v.* Smith, 13 Cal. 373;
Moore *v.* Wilkinson, *Id.* 478;
Stark *v.* Bennett, 15 *Id.* 363;
Doll *v.* Meador, 16 *Id.* 324;
Teschemacher *v.* Thompson, 18 *Id.* 11;
Leese *v.* Clark, *Id.* 535; 20 *Id.* 423;
Ward *v.* Mulford, 32 *Id.* 365;
Durfee *v.* Plaisted, 38 *Id.* 80;
Chipley *v.* Farris, 45 *Id.* 539;
Cassidy *v.* Carr, 48 *Id.* 339;
Cruz *v.* Martinez, 53 *Id.* 239;
Thompson *v.* Doaksum, 68 *Id.* 597;
People *v.* San Francisco, 75 *Id.* 389;

Adair *v.* White, 85 *Id.* 313;
Valentine *v.* Sloss, 103 *Id.* 220;
Irvine *v.* Tarbat, 105 *Id.* 243;
Dreyfus *v.* Badger, 108 *Id.* 58;
L. A. Farming & Milling Co. *v.* Thompson, 117 Cal. 594;
Saunders *v.* La Purissima Gold Mining Co. *et al.*, 125 Cal. 159;
Wormouth *v.* Gardner, 125 Cal. 316.

II.

IF IT IS ASSUMED, CONTRARY TO THE FACT, THAT APPELLEE DOES NOT HOLD THE PAPER TITLE, NEVERTHELESS, APPELLANTS' ENTRY AND OCCUPANCY WERE UNLAWFUL AND THE JUDGMENT AND ORDER WERE PROPERLY AFFIRMED IN THE COURT BELOW.

When the appellants, co-defendants, were before the Supreme Court of the state of California [34 Pac. Rep. 518], the following brief opinion was rendered:

"This is an action of ejectment brought against "the defendant, Hoff, and over one hundred others, "to recover possession of the south half of the San "Fernando rancho in Los Angeles county. Upon "the facts shown at the trial we think there can be "no question as to the right of the plaintiff to "recover in this action and the question of error in "the instruction becomes immaterial. The Supreme "Court of the United States in a recent decision has "construed the act of congress of February 25, 1885, "and in effect answered every proposition upon "which the appellants rely here. [Cameron *v.* U. "S., 148 U. S. 301.] The plaintiff has been under "possession under sanction of a judicial decree for "about twenty-five years. Its claim has been made "in good faith and under color of title, while the "defendants are mere naked trespassers. The case

"comes squarely, therefore, within the decision above "referred to and requires no further consideration. "See also U. S. *v.* Brandenstein, 32 Fed. R. 720, and "Rourke *v.* McNally, 98 Cal. 291. We find no error "in the record. Judgment and order affirmed."

In the Hoff case, *supra*, there was as we have already remarked, some ground for the contention that a part of the land claimed by the appellants there was outside of the San Fernando grant. Those litigants asserted a right of possession in the neighborhood of the line of the Rancho Las Virgines. (See southwest corner of the Reynolds map, plaintiff's exhibit 29.) Neither of the present appellants are near that locality. The doubt, if it was such, which existed in the Hoff case, arose with reference to the southwest corner grant as shown by exhibit 29, *supra*, and regarding station "S. F. 39." The entire accuracy, however, of the line delineated upon such exhibit is now proven by the testimony of Pico, who fixes the station clearly and indisputably. [Tr. fols. 402, *et seq.*]

While the appellants here assert that they are qualified homesteaders in certain respects, they rest entirely upon the mere statement of that fact in their answers. Neither of them made any proof of the possession of the statutory qualification required by section 2289 U. S. revised statutes.

It is therefore obvious that the former decision [34 Pac. Rep. 518] is directly in point. But if appellants were duly qualified homesteaders the same result would follow, The laws of the United States do not authorize an entry upon the actual possession of another for the purpose of making a settlement though made by one qualified to purchase from the government, or to acquire a homestead, although such entry is made with the intent to acquire the title in some lawful mode.

Rourke *v.* McNally, 98 Cal. 292;
Peterson *v.* Kinkead, 92 *Id.* 377;
Hosmer *v.* Dugan, 56 *Id.* 257;
McBrown *v.* Morris, 59 *Id.* 74;
Plummer *v.* Brown, 70 *Id.* 547;
Bullock *v.* Rouse, 81 *Id.* 595;
Atherton *v.* Fowler, 96 U. S. 517;
Hosmer *v.* Wallace, 97 *Id.* 575;
Trenouth *v.* San Francisco, 100 *Id.* 251;
Quinby *v.* Colan, 104 *Id.* 420;
Mower *v.* Feltcher, 116 *Id.* 381;
Durand *v.* Martin, 120 *Id.* 369;
Cowell *v.* Lammers, 10 Saw. 252, 21 Fed. Rep. 203.

"A mere intruder cannot enter on a person actually seized and eject him and then question his title or set up an outstanding title in another. * * * If the plaintiff had actual prior possession of the land this is strong enough to enable him to recover it from a mere trespasser who entered without any title."

Haws *v.* Victoria Copper Mining Co., 160 U. S. 303.

It is conceded that appellee was in possession of a part, if not of the whole, of the tract claimed by him. That appellee made such claim under the decree of partition which was based upon the Reynolds map [plaintiff's exhibit 29], and upon various written instruments according therewith, is proven beyond cavil. See testimony of Lankershim [Tr. p. 111, *et seq.*] Van Nuys [Tr. p. 125, *et seq.*] Also statement, p. 107.

If appellee's actual possession had covered a part only of the tract in question, such possession would have been sufficient to warrant this action.

Walsh *v.* Hill, 38 Cal. 482;
Wolfskill *v.* Malajowich, 39 *Id.* 281;
Webber *v.* Clarke, 74 *Id.* 16;
Dodge *v.* Yates, 76 *Id.* 254;

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> "To create a right of pre-emption there must be settlement, inhabitation and improvement by the pre-emptor, conditions which cannot be met when the land is in the occupation of another. Settlement, inhabitation and improvement of one piece of land confer no right to another adjacent to it which, at the commencement of the settlement, is in the possession and use of others, though upon a subsequent survey by the government, it proves to be a part of the same section subdivision. Under the pre-emption laws as held in Atherton *v.* Fowler, the right to make a settlement is to be exercised on unsettled land, the right to make improvements is to be exercised on unimproved land, and the right to erect a dwelling house is to be exercised on vacant land. None of these things can be done on land when it is used and occupied by others."
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> Hosmer *v.* Wallace, 97 U. S. 575.

The transcript is barren of anything indicating lack of good faith upon the part of the appellee. Apart from the stipulation which shows that the San Fernando Farm Homestead Association, plaintiff's predecessor, paid $115,000.00 in 1869 for an undivided half of the San Fernando grant [Tr. fol. 315] we have also Mr. Van Nuys' evidence and that of Mr. Lankershim as to the extensive improvements made, taxes paid, and other moneys advanced in caring for, improving, and bringing the property into productiveness. If they had faith in a patent issued by this government under the responsibilities of treaty obligations, who can blame them?

FURTHER CONSIDERATION OF THE CASE IN VIEW OF CERTAIN POINTS MADE BY APPELLANTS IN THEIR ASSIGNMENTS OF ERROR.

(*a*) It is claimed by assignment of error No. 2 that the court erred in sustaining an objection to the introduction in evidence by appellants of the

original petition of Eulogio de Celis. [See Tr. fols. 692, 718.]

The authorities heretofore cited under point 1 effectually dispose of this contention.

Dolan *v.* Carr, 125 U. S. 618, relied on by appellants in their argument in the court below, has been so often explained that it is not worth while to take up the subject again.

Knight *v.* The United States Land Association, 142 U. S. 161; Barden *v.* Northern Pacific Railroad Co., 154 U. S. 288, and Stoneroad *v.* Stoneroad, 158 *Id.* 240, will suffice.

Appellants seem to forget that the United States Supreme Court in Beard *v.* Federy, *supra*, determined that the patent, not only conclusively fixed the boundaries, but it constituted likewise a governmental declaration of the validity of the grant. The patent must be considered absolutely determinative as to both grant and location unless set aside in a direct proceeding by the government brought in accordance with the principles laid down in U. S. *v.* Throckmorton, 98 U. S. 61, U. S. *v.* Hancock, 133 U. S. 193, and Knight *v.* The U. S. Association, 142 U. S. 161.

The action of the board of land commissioners when it became final by affirmance or dismissal of appeal, was conclusive upon all parties including the government.

Botiller *v.* Dominguez, 130 U. S. 238.

(*b*) The point made by appellants, under assignment of error No. 3, is already answered.

(*c*) Appellants' fourth assignment of error is to the effect that the court erred in instructing the jury to find in favor of appellee. The principles already discussed, and the evidence heretofore cited completely meet this contention.

Not having appellants' brief before us, we do not know what position they will take in argument to

sustain this position. We infer, however, that they will make the same argument here that they did in the court below. There they insisted that there was nothing to inform the court as to whether appellee's right to possession rests on title or prior possession. There will not be any doubt, we think, in view of the record, that this court will hold that appellee should recover on both grounds. If appellee's right to recover on either ground was established to the satisfaction of the court, beyond a doubt, and the showing made by the defendants below, appellants here, was insufficient to establish a defense, then the trial court did not err in instructing the jury to find for the appellee Where the evidence is clearly insufficient to support a verdict in favor of the party against whom the instruction to find a verdict is given, the ruling will be sustained.

Lacey *v.* Porter, 103 Cal. 605.

This case grew out of the efforts of persons associated with the appellants in this action, to unlawfully seize portions of the north half of the San Fernando rancho.

Lacey *v.* Porter was cited with approval in the concurring opinion of Justice Harrison, in the case of White *v.* Warren 120 Cal. p. 329. The converse of the rule laid down in Lacey *v.* Porter must necessarily be sound law; that is to say, if the plaintiff has made a case, and the showing of the defendant is insufficient to support a verdict, should one be rendered in favor of the defendant, it lies within the province of the court to instruct the jury to find for the plaintiff.

(*d*) The appellants' last assignment of error is that "The court erred in rendering a judgment of affirmance of the judgment and order of the trial court in favor of the plaintiff, when it should have rendered a judgment of reversal in favor of the defendants in that court. Reference is hereby made

to the record of said case for further particulars bearing on this petition and these assignments of error."

It would seem superfluous to add that the argument already made by us is a complete answer to the position here taken by the appellants. But, in order that we should not leave any of the points relied upon by appellants in the argument of this cause in the court below unanswered, we will briefly reply to the argument made there, and which we presume will be made here upon various questions which would naturally arise under the fifth assignment of error.

It was urged in the court below that the trial court erred in failing to instruct the jury that unless they could find from the evidence that an actual survey was made, then all the evidence as to the exact location of such survey falls to the ground. A survey never made can have no location in fact. The court below ignored this offer.

It was also urged that the Hancock survey was void and the patent nugatory because of certain errors in that survey and because, among other things, the witness Pico, who was one of Hancock's assistants, said that the survey was made in the summer of 1858, when, in fact, it was made in December, of the same year.

An error caused by a failure of memory as to an event transpiring more than one-third of a century before the trial, does not even create the slightest suspicion.

Another fact which counsel exaggerated in the court below into relevancy, is the statement of appellee's witness Ensign that the Hancock survey was not made according to the minutes. Had it been otherwise, there would have been a perfect survey—quite impossible under any circumstances, and never to be expected in the survey of a mountainous

country, such as that over which Hancock was compelled to tramp. Counsel even urged in argument, in the court below, that he believed that Hancock did not make a survey. But counsel is not a witness, and if he had been, such testimony would have been excluded.

The conclusive answer to all this sort of argument is that the government has finally determined that Hancock did make the patent survey, and the testimony of Ensign shows that there is no difficulty in locating it; at least, no more difficulty than is common in cases involving Mexican grants in California. Many errors in courses and distances appear—one or two in the description of monuments—such, for instance, as the call for a live oak tree at station 39, when in truth the tree actually marked was a white oak. [Tr. fol. 606.] This is the tree which the witness Pico identified as being the actual monument adopted by Hancock. Pico pointed out, as we have previously shown, the tree to Ensign. [Tr. fols. 405, 422-3.] It might be added that Pico was over every foot of the Hancock survey [Tr. fol. 407]. At folio 426 Ensign referred to an impression (negative) appearing upon the inside of the bark of a tree found by him upon the northwest corner of the Escorpion ranch, which is station 34 of the patent boundary. This fragment demonstrated that many years before, doubtless in 1858, when Hancock was there, the letters appearing upon it in negative had been cut into the wood and gradually the bark spread over and into the wounds made by the party who formed the letters. Thus there was proved, in an uncommon manner, the identity of that particular tree. If Grove's vagaries were to prevail, we would reach the ridiculous result that this tree had been moved half a mile.

Mr. Ensign was also able to correct an erroneous call of considerable magnitude in the Hancock sur-

vey, because of the location of the coast survey monument mentioned *ante* [Tr. fols. 429, 461, 464, 465, *et seq.*]

In determining the boundaries of the patent, courses and distances must yield to natural objects or monuments called for.

Adair *v.* White, 85 Cal. 313.

In that case, the court said: "It rarely happens that the lines of one survey run by courses and distances are found to coincide with the lines so run in a subsequent survey." See also C.C.P. of California, section 2077.

It has been held that a mountain range is a definite boundary and the boundary goes to the comb or dividing line of the ridge.

Ornbaum *v.* His Creditors, 61 Cal. 455.

As between the map and the survey the latter controls.

O'Farrell *v.* Harney, 51 Cal. 125;

Cleveland *v.* Choate, 77 *Id.* 78;

Whiting *v.* Gardiner, 80 *Id.* 80.

For other rules applicable to this subject, we refer to:

Tognazzini *v.* Morganti, 84 Cal. 159;

Beaudry *v.* Doyle, 68 Cal. 105;

McIver's Lessee *v.* Walker, 7 Cranch. 177;

Colton *v.* Seavey, 22 Cal. 496;

2 Dev. on Deeds, sec. 1029.

It will be remembered that Mr. Wiley not only referred to the south boundary line as being on the comb of the mountain, but he also testified to the holding of possession up to the San Vicente line. [Tr. fols. 318-9.]

Mendenhall *v.* Paris, 84 Cal. 193.

Although a survey may be inaccurate in many respects, it is not necessarily void for that reason. In Higuera's heirs *v.* U. S., 5 Wall. 469, the court said that "most or all of the courses given in the

decree are undoubtedly erroneous." Yet that decree was sustained.

In the argument of this case in the court below, counsel for appellants criticized the trial court because of its failure to instruct as to what constitutes possession. The alleged error is immaterial, because there is no dispute, notwithstanding counsel's assertion to the contrary, that the appellants did enter upon land in the actual possession of appellee, nor is there any rational controversy regarding the completeness of appellee's paper title. However, we will briefly consider the specific objections they have urged upon this point. It was said that the alleged possession was not definite as to its boundary. Counsel disputed the testimony of Mr. Van Nuys, and averred that it was not true that Mr. Van Nuys has always claimed under the Reynolds or partition map. No witness was put upon the stand to contradict Mr. Van Nuys. It is not true that there are conflicting maps, embracing different areas of great extent. The Hancock survey, when located by fixed monuments, by adjacent government surveys and Mexican grants, coincides with that of Reynolds. But the conclusive answer to this contention is that the appellants here did not attempt to confine their predatory expeditions to the premises located near the exterior boundaries of the grant, but they penetrated to the heart of the tract and seized lands which no one pretends, as far as the evidence goes, are outside of the patent survey, even as the same is erroneously located by the platting of Grove in plaintiff 's exhibit 2.

It was also claimed in the court below, by appellants, that there was nothing to establish the correctness of plaintiff 's exhibit 30, and that the same depends upon the Reynolds survey. But the Reynolds survey is proven to be correct by the testimony of Ensign, so also as to exhibit 30 [Tr. fol.

424], and neither the witness Grove, nor any one connected with the defense, have made any investigation of the boundary lines upon the ground. And if the court will refer again to witness Grove's map, plaintiff's exhibit 2, and will observe the locations of the Rancho El Encino thereon, and will then recur to plaintiff's exhibit 30, it will be seen that there is no material difference as far as appellants' attempted locations are concerned, between the statements of Grove and those of our witnesses. Grove pretended that the blue line immediately south of the south line of the Encino is the true location of the Hancock survey. The falsity of this claim is manifest when we remember that the San Vicente and San Fernando ranchos have, at that point, a common boundary. But, assuming that witness Grove is right, for the time being, still each of the appellants is north of the south line of the San Fernando, as he locates it, and not one of them is south of the prolonged south boundary of the Encino. One of the parties, Mrs. Mosher, took possession northeast of the Escorpion and just south of the line which separates the appellee's premises from the other owners of the San Fernando on the north. [See tract marked "Rose D. Mosher" on plaintiff's exhibit 30.]

The appellant John J. Shore personally marked his location on exhibit 30. [Tr. fol. 346.] [See also admission by Grove, Tr. fol. 778.]

We have already alluded to the fact that there were 12,000 acres constituting the easterly portion of the tract set apart to the San Fernando Farm Homestead Association, sold prior to the appellants' entry. This tract is about five miles east of the Encino and is not in any way involved here.

In argument below counsel also asserted that the Reynolds map fixes the various sections half a mile from their true location on the government map. If

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this remark were correct, the circumstances would not aid appellants, because they would all still be within the most circumscribed survey of the San Fernando which their ingenuity has been able to devise or suggest. Appellants also claim that one P. Higgins has occupied a portion of the ranch, and that therefore appellee's possession had not been exclusive; but, accepting Higgins' statements as absolutely reliable, no benefit can accrue to appellants. This witness, as heretofore shown, claims that he, Lavalle and Tullis occupy parts of sections 35 and 36, which he fixes as being on the south line of the San Fernando grant. [Tr. fol. 750.] But he and his fellow settlers hold up only to what is marked on Grove's map "plaintiff's exhibit 2," as the south line of the Hancock survey. They have made no other intrusion upon the tract. They do not attempt to go north of that line. [Tr. fol. 756.] The witness Higgins admitted that he is south of the Encino. Assuming, therefore, that Higgins and his associates are in possession of a strip containing thirty or forty acres or more along the south boundary of the grant, how can this be said to interfere with the exclusive possession by plaintiff of the property upon which these appellants squatted. Appellants also claim, in argument in the court below, that the record showed that for ten years prior to the date of ousting, appellants' possession had been "scrambling." Such a position is absurd. The testimony of Van Nuys, Lankershim and others, not denied by any of these appellants, settles this. At times, misguided and badly advised men have entered upon appellee's property. They have been uniformly ejected. Their holdings have been very small, and their career was brief. These suits, one of which [34 Pac. Rep. 518], was affirmed in favor of the appellee here, in the court below, from which this appeal has been taken, demonstrate the legality

and rectitude of appellee's contentions, and constitute an adoption and recognition of the position taken by that corporation as to its grant and the boundaries thereof. If A enters B's house unlawfully, and B seizes him and duly throws him out of the window, or calls in a policeman who properly performs such service, the appellants here would claim that thereupon they would be authorized to pounce upon B's possessions because of his previous disturbance by an audacious and unsuccessful miscreant. The lands upon which appellants entered had been farmed. The stubble fields of those whom they deliberately sought to wrong were under their feet. The title which they took was a United States patent, and it might well be said here, of the claims of the appellants, as was said by Justice Van Dyke in the case of Saunders *v.* La Purissima Gold Mining Co., *et al.*, 125 Cal. page 167, that "if such claims as that presented by the defendants here were sanctioned by the court, a patent to lands in this state, instead of being a muniment of title, would simply be an invitation to parties to invade the premises for the purpose of ascertaining whether facts and conditions existed prior to the grant or patent so as to avoid the same."

(*e*) It was also claimed by appellants' counsel in argument in the court below, that there was no cultivation of the lands entered upon by the appellants, and an attempt was there made to prove that witnesses Gray and Van Nuys contradicted themselves. Both of these witnesses agree that all of this land was cultivated. Mr. Van Nuys, who is most familiar with the property, goes over the matter in detail. [Tr. pp. 127–130.] Mr. Gray's evidence speaks for itself, and establishes the willful destruction of property by a number of unscrupulous trespassers, including appellants. [Tr. fols. 354, 355, 356.]

Evidence is to be estimated, not only by its own

intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was in the power of the party, the evidence should be viewed with distrust.

C.C.P., Sec. 2061.

If Van Nuys, Lankershim, Gray and others did not locate the scenes of appellants' marauding with accuracy, why did not appellants take the stand and so testify? Why did they leave the question of possession to be determined without announcing their views? The answer is not difficult. They avoided speaking whenever possible, and Shore and Tarbell, who did appear, were compelled by appellee, and they fixed their locations definitely, as indicated upon exhibit 30, and with relation to both the Escorpion and Encino ranchos. They did not dare to swear that any statement made by appellee was untrue.

(*f*) The further point was made in the court below that the court should have instructed the jury that it was necessary to show that, at the time of the commencement of the action, the appellants here were in possession of a portion of the land. Undoubtedly, it must appear that at the time of the commencement of the suit there had been an ouster. Counsel argued that it was shown by the testimony of Gray [Tr. fol. 356] that there was no exclusion of appellants from possession. Mr. Gray does show that there was an actual entry and disturbance of appellee's occupancy. The appellants, by their filings in the land office [see testimony of Stevens, Tr. p. 123, *et seq.*] made an attempt to appropriate the land. Tarbell and Shore swore that they entered for the purpose of *maintaining a settlement*; that they intended to acquire the property; that they were members of an association containing over 100 people, organized for the

purpose of settlement upon this property. [Tr. fols. 397-402.] Grove testified with reference to the association, and that he pointed out various sections to different people who desired to settle. It is shown in Lacey *v.* Porter, 103 Cal. 605, and Los Angeles Farming and Milling Company *v.* Hoff, 34 Pac. Rep. 518, that there was an organized effort by a squatters' league to settle upon the entire rancho ex-Mission San Fernando, the south half of which, less 12,000 acres, is involved in this action. Grove was the league surveyor [Tr. fols. 775-7], and his name bobs up frequently in both of the cases lastly hereinbefore cited, as performing the functions of that office. Van Nuys said that twenty or thirty squatters built homes upon the ranch. [Tr. fols. 385-6.] There was a conspiracy on the part of the squatters' league referred to, looking to the despoiling of the appellee. This suit was brought October 31st, 1891. [Tr. fol. 36.] Appellant Shore concedes that he entered October 8, and left December 10th, 1891. Tarbell joined the league in September, 1891, and was on the ranch for two months. [Tr. fols. 398-9.] The attempted filings were made about the time the suit was brought, to-wit: Mosher, October 21st, 1891; Cox, October 19, 1891; Shore, October 22nd, 1891; Vincent, October 17th, 1891; Carter, October 12th, 1891; Tarbell, September 30th, 1891. [Tr. fols. 361-369.]

One of the peculiar features of the defense herein consists in the fact that although the appellants each pretend that they are entitled to 160 acres of land, not one of them is willing to identify these premises in his answer. But there is nothing in the position assumed by appellants in the court below, that made it necessary to show possession by them, on any theory, for no issue as to ouster is made by the answer. There is but one defense pleaded and the same is found in answer containing twenty paragraphs. [Tr. fol. 44-98.] Let us con-

sider paragraph XVI, [Tr. pp. 32-3]. There the defendant admits she entered upon a claim of one hundred and sixty acres of the land described in the complaint, but which she says is outside of the limits of the grant. [Tr. fol. 90.] That she entered upon said land with the intention of declaring a homestead thereon; that the lands are within the boundaries of the appellee's claim, but are within the boundaries of the tract originally confirmed to de Celis. [Tr. fol. 91.] The paragraph concludes with this recitation: "Defendant says it is not true that she has no interest in the said one hundred and sixty acres. As an actual settler thereon she asserts a right to occupy and complete her title thereto under the homestead laws." In the next paragraph XVII, [Tr. fol. 94], she admits her entry, but denies that appellee was in possession. Denies that the land belongs to appellee [Tr. fol. 97]. We have already called attention to the fact that the description contained in the complaint is made in accordance with the Reynolds map. Paragraph XI [Tr. fol. 80] defendant denies the ownership of appellee. The answer to which we have thus referred is similar in all respects to those filed by the other appellants. [Tr. fol. 849.]

> "An ouster may be and very frequently is admitted by the pleadings. Where a defendant in his plea or answer sets up the defense of adverse possession his plea or answer to it will be treated as a confession of the ouster and render the proof unnecessary on the trial. So where a defendant denies the title of the plaintiff and his right of entry, or pleads not guilty and claims the exclusive possession and the like, the ouster is admitted."
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> Newell on Ejectment, p. 133.

Where defendant admits that he was in possession of a part of the premises claiming it, the ouster is established.

McCreery *v.* Everding, 44 Cal. 287.

Wrongful withholding of possession is an ouster.
Marshall *v.* Shafter, 32 Cal. 194.

Where in ejectment the answer puts in issue the plaintiff's title and right of possession, a denial of plaintiff's title, coupled with the taking of possession of part of the property is itself enough to establish an ouster.

Salmon *v.* Wilson, 41 Cal. 610;

Carpentier *v.* Gardiner, 29 Cal. 160.

If the invaders with whom these appellants are associated had clearly marked, had specifically notified plaintiff of the exact claim made, still they could have been well sued together. It is really a common enterprise, the result of a carefully conceived conspiracy. If we had sued these people for a specific piece of property within the main grant, we would have had much difficulty in locating their possession. Their situation is not one which appeals to honesty or fair dealing.

For reasons given in the Hoff case, *supra*, it made very little difference what instructions were given or refused. The verdict was right in any event.

(*g*) It was also urged by appellants, in the court below, that the trial court erred in refusing to instruct the jury that they might render separate verdicts.

When it is considered that the verdict must, in any event, have been adverse to appellants, it becomes obvious that it is wholly immaterial whether the jury reported their conclusions separately or otherwise. There is no rule of law in conflict with this proposition.

(*h*) Much was urged in argument in the court below as to the sacredness of jury trials and as to the misfortunes of the poor litigant who knows (as stated by counsel for appellants) "that the judge owes his election to the adverse party at whose pleas-

ure he may be unseated at the coming election," etc. All this is irrelevant.

As long as those who, like appellee here, are rightfully in possession of property for which they have paid their own good money, are interfered with by such despoilers as these appellants, so long will judges who obey the law instruct juries as did the trial court in this action. It would be a sad state of affairs were it otherwise. All insinuations and pretensions concerning the invalidity of appellee's patent are fanciful creations. The original grantees herein of the Mexican government are dead. Hancock, who located the patent lines, is no more. The property has passed into the hands of innocent purchasers, and had there been frauds innumerable the same would not, even in a suit by the government, be sufficient to affect the patent under which appellee claims. [Colorado C. & I. Co. *v.* U. S., 123 U. S. 307.]

After all our courts have so positively denied the right of any so-called homesteader to enter upon the possession of another, and have, without variation, denied the right to collaterally impeach a patent, the repetition of attempts in those directions is unaccountable.

Your honors will recognize that in preparing our brief in this case without having received the brief of the appellants, we are placed at considerable disadvantage, and have had to indulge in conjectures to some extent as to the line of argument to be adopted by the appellants. Our knowledge of the positions taken by them in all former hearings of this case has been our only guide as to the position which will be taken by them upon this final hearing, and if we have pursued our inquiry as to minor points which can be incidentally raised under the specifications of error to the verge of tediousness, we have done so from abundant caution.

We respectfully submit that the judgment of the Supreme Court of the state of California was in all particulars correct and should be affirmed.

STEPHEN M. WHITE,
JAMES H. SHANKLAND,
Solicitors for Appellee.

GRAVES, O'MELVENY & SHANKLAND, *of Counsel.*

Appendix.

[L. A. No. 182. Department one. July 22, 1897.]

Los Angeles Farming & Milling Co., respondent, *v.* C. S. Thompson *et al.*, appellants.

Appeal from a judgment of the Superior Court of Los Angeles county and from an order denying a new trial. Walter Van Dyke, judge.

OPINION OF THE COURT.

Harrison, J.—This action was brought against a large number of defendants to recover possession of certain land in the county of Los Angeles and to restrain the defendants from injury thereto. The land described in the complaint is the south half of the Rancho ex-Mission de San Fernando, with certain exceptions, and the complaint alleges its ownership by the plaintiff, and the unlawful entry thereon and withholding of the possession by the defendants, and that they are committing injury, both temporary and permanent, to the said land. Most of the defendants suffered default, but eight of them filed answers to the complaint, upon which the cause was tried before a jury. At the close of the trial, upon the motion of the plaintiff, the court directed the jury to find a verdict in its favor against these defendants. From the judgment entered thereon and from an order denying a new trial they have appealed.

At the trial the plaintiff introduced in evidence a patent from the United States to Eulogio de Celis for the Rancho ex-Mission de San Fernando, dated January 8, 1873, and showed that the grantor of the plaintiff, who had purchased an undivided half of the rancho in 1869, had, after the issuance of the patent, brought a suit for a partition of the rancho, and that by the decree in that suit he was awarded the tract described in the complaint.

The patent recites that in the petition of the claimant presented to the board of land commissioners he "claimed the confirmation of his title to a tract of land known by the name of Mission of San Fernando, containing fourteen square leagues, situated in the county of Los Angeles, and state of California, said claim being founded on a Mexican deed of grant to the petitioner, made on the seventeenth day of June, 1846, by Pio Pico, then constitutional governor of the department of the Californias."

The defendants offered to introduce in evidence the petition of Eulogio de Celis to the board of land commissioners for the confirmation of his claim to the land, together with copies of the grant from Governor Pico to him; the decree of confirmation of the claim by the board, with its opinion upon its validity; and stated in connection with their offer that they "proposed to prove by said petition and by such alleged grant that the petitioner did not claim said lands or any part thereof, by virtue of any right or title derived from the Spanish or Mexican government; that they wished to prove by said documents that said grant was void, for the reason that it was an attempted grant of mission lands reserved from and not subject to grant under the laws and regulations of the Mexican government, and that the facts stated in said petition and in said grant proved that said board had no jurisdiction over the subject matter of said case, and that the decree confirming said claim was without jurisdiction and void." Upon the objection of the plaintiff that this evidence was irrelevant, incompetent, and immaterial, it was excluded by the court. This ruling is claimed by the appellants to have been erroneous, and in support of their claim they contend that the only claims to land which the board of land commissioners had jurisdiction to pass upon were such as were "by virtue of any right or title derived from

the Spanish or Mexican government," and that as the petition for confirmation showed that the claim was not by virtue of such right or title, the board had no jurisdiction over it, and that its decree of confirmation, as well as the patent issued thereon, were void, as being the acts of officers without authority over the subject matter upon which they acted; that it appears upon the face of the petition that the board of land commissioners had no jurisdiction in the matter, for the reason that at the date of the grant the government of California had no authority to make a sale of this land. In support of the latter proposition appellants cite the cases of United States *v.* Vallejo, 1 Black, 541, and United States *v.* Workman, 1 Wall. 745. These were cases, however, in which appeals were taken by the United States directly from the decree of confirmation, and were direct attacks upon the validity of the judgments appealed from, whereas the evidence offered in the present case is for the purpose of a collateral attack upon the validity of the decree of confirmation. The board of land commissioners was authorized to adjudicate upon the validity of every claim for lands in California which purported to be derived from the Spanish or Mexican government. The validity of the claim included the authority of the governor to make the grant, as well as the existence or effect of the laws of Mexico concerning the same, and the jurisdiction of the board extended to the determination of each of these questions as fully as to determining whether there had been a full compliance with the forms of law in making the grant, and its judgment thereon cannot be collaterally assailed on account of any error it may have committed in reference thereto.

The same question was presented in Beard *v.* Federy, 3 Wall. 478, where, after the patent had been introduced in evidence by the plaintiff, the

defendant produced the petition of the claimant before the board of land commissioners and insisted that it showed a want of jurisdiction in the board for the reason that it did not set forth any right or title derived from the Spanish or Mexican government; but the court said: "The board having acquired jurisdiction, the validity of the claim presented and whether it was entitled to confirmation were matters for it to determine; and its decision, however erroneous, cannot be collaterally assailed on the ground that it was rendered upon insufficient evidence;" and, in considering the effect of a patent, said: "By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now so as to embrace the premises as they are surveyed and described. As against the government, this record, so long as it remains unvacated, is conclusive, and it is equally conclusive against parties claiming under the government by title subsequent." In Moore *v.* Steinbach, 127 U. S. 70, the plaintiffs claimed under a patent of the United States issued to Manuel Antonio Rodrigues de Poli, which recited the proceedings taken before the land commission; the filing of a petition for the confirmation of his title to a tract of land known as the Mission of San Buena Ventura, his claim being founded upon a sale made on the 8th of June, 1846, by the then governor of the department of California; the degree of confirmation of that claim by the board of land commissioners, and its affirmance by the District Court and the Supreme Court on appeal. It was contended by the defendants that the sale to Poli of the ex-Mission of San Buena Ventura was illegal and void, and that hence no title passed to the patentee on its confirmation, and

United States *v.* Workman, *supra*, was cited in support of this contention; but the court said: "It does not follow that there were not exceptional circumtances with reference to the sale to Poli which authorized the governor to make it. We are bound to suppose that such was the case, in the absence of any evidence to the contrary, from the fact that the validity of his claim under it was confirmed by the board of land commissioners, by the district court of the United States, and by this court on appeal. The question of its validity was thereby forever closed, except as against those who might be able to show a prior and better title to the premises."

The appellants also contend that the court erred in directing the jury to find a verdict in favor of the plaintiff. The correctness of this ruling depends upon whether there was any evidence before the jury which would have authorized a different verdict. If, upon the trial of an issue, there is any conflict in the evidence, or if different inferences of fact may be drawn from the evidence, it is the function of the jury to determine the issue; but if, upon all the evidence in the case only one conclusion or finding can be made, it is immaterial whether the jury make that conclusion or finding by direction of the court or upon their own deliberation. The verdict must be in accordance with the evidence, and cannot be given from conjecture, or at the arbitrary discretion of the jury; and, if the evidence is such that the court would be bound to set aside a verdict in favor of one party as contrary to the evidence, the matter becomes a question of law to be ruled upon by the court, and it is not required to submit the case to the arbitrament of a jury, but may direct a verdict in accordance with its ruling upon the question of law.

To authorize a verdict in its favor the plaintiff was required to establish its title to the lands

described in the complaint, and to show that at the commencement of the action the defendants were unlawfully in the possession of some portion thereof. The patent from the United States established the title of the patentee to the lands embraced within the survey contained therein, and it was admitted at the trial that whatever title to the property described in the complaint passed from the United States by the patent had become vested in the plaintiff. The defendants sought to show at the trial that there had been no actual survey upon the ground of the tract described in the patent, and that for this reason the patent was invalid; but a patent is an instrument of too solemn a character to be disregarded by reason of evidence of this character. Its issuance by the government foreclosed all collateral attacks upon the regularity and sufficiency of any of the steps or proceedings upon which it depended. It was a declaration by the government, as was said in Beard *v.* Federy, *supra*, that the claim asserted "is correctly located so as to embrace the premises as they are surveyed and described." The survey set forth in the patent had been made in 1858 by Henry Hancock, and in December, 1870, a resurvey of the rancho had been made by one Reynolds for the purpose of the aforesaid suit in partition. The description in the complaint is according to the Reynolds survey, and in 1892, after the commencement of the present action, the rancho was again surveyed by one Ensign, by whose testimony it was shown that the map or plat of the Reynolds survey was a correct delineation of the land described in the patent. It was shown upon the cross examination of this witness that there were certain variations in the courses and distances given in the Hancock survey from those given in the Reynolds survey, and that some of the monuments named in the Hancock survey could not be

found. The defendants also introduced a "comparative map" on which had been platted the lines of the several surveys of Hancock, Reynolds, and Ensign, according to the courses and distances given in their field notes, and which indicated a discrepancy in a certain part of the tract of nearly half a mile in extent. From these facts they contend that Hancock did not make a survey upon the ground according to the courses and distances given in the patent, and that the discrepancy between the several surveys shows that the description of the land given in the patent is so indefinite as to render it void. Whether a particular parcel of land is within the lines of a survey is a question of fact to be shown by evidence, but whether the lines of a survey which purport to describe a tract of land in a deed sufficiently defines the land to be conveyed is to be determined by the court when the deed is offered in evidence. The field notes of a survey are not limited to the courses and distances set forth therein, but include also the monuments referred to, and all the objects mentioned by which the lines of the survey can be ascertained. All of these make up a description in words by which a map or picture of the tract as it appears upon the surface of the earth may be placed upon paper and presented to the eye. If there is any discrepancy between the monuments and the courses and distances, the monuments must prevail, and if these monuments can be ascertained, the lines connecting them will be the lines of the tract, irrespective of their variation from the lines given by the courses and distances. The rancho in question contains upward of one hundred and sixteen thousand acres, has forty-four exterior lines of boundary, many of them several miles in length, and situated in a mountainous and uncultivated region. It is not to be expected that the lines of any two surveyors in tracing these boundaries according to their

courses and distances merely would coincide exactly, or that the measurement and direction between the monuments would in all instances be the same. [See Adair *v.* White, 85 Cal. 313.] But the description is sufficiently definite if the entire body of field notes affords sufficient data for its location. It may be added that the lands in the possession of the defendants, and which they claimed were not within the boundaries of the lands claimed by the plaintiff, are far within the lines of the patent as shown by the plat of either of these surveys. From the evidence before the jury it could not have been found otherwise than that the tract of land described in the complaint was within the boundaries of the patent.

The possession by the defendants of a portion of the lands within the tract described in the complaint was admitted by their answers. Their denial that they unlawfully entered upon the lands, or that they unlawfully withhold possession from the plaintiff, puts in issue only the character of their possession, and their affirmative allegation that they each entered upon one hundred and sixty acres of the lands claimed by the plaintiff, and that the lands so entered upon by them are within the boundaries of the land claimed by the plaintiff, but that the plaintiff has no title thereto by reason of its being outside of the boundaries of the grant which was originally confirmed to Eulogio de Celis, relieved the plaintiff from the necessity of further proof of their possession. As they did not designate the particular tracts of which they alleged that they were in possession, there was no reason for a separate verdict in reference to each defendant, but the plaintiff was entitled to a verdict for the possession of the entire tract upon showing that it had title to all the land which it claimed in the complaint. This showing, as we have seen, was made by the introduction of the pat-

ent and the testimony with reference to the lines of the survey therein contained.

The judgment and order are affirmed.

Temple, J., and Van Fleet, J., concurred.

Hearing in bank denied.